December, 1967. Under the transitional and saving provision contained in paragraph 33 of Schedule 9 to the Income Tax Act, 1967 this exemption must be deemed to have been made by an order under section 127 or any corresponding provision of the 1967 Act. In other words, the exemption granted by the 1966 Order continued to be operative in the year 1968 as though such order was made under section 127 of the 1967 Act or under any other corresponding section, such as section 132. The 1966 Agreement also remained in force during the year 1968, even though the order giving it the force of law had been repealed. Simultaneously with the termination of the 1966 Agreement as from 1st January, 1969, there came into force the Double Taxation Relief (Singapore) Order, 1968 which was made under section 132 of the Income Tax Act, 1967. The exemption under the 1966 Agreement having been kept alive by the transitional and saving provision contained in Schedule 9 to the 1967 Act until 31st December, 1968, the respondent had acquired a benefit under the 1966 Agreement which by virtue of paragraph 2(b) of Article XXI of the 1968 Agreement was not affected, notwithstanding the provision in paragraph 1(a) of the same Article of the said Agreement that it shall have effect as respects Malaysian tax for the year of assessment 1969.

I would therefore dismiss this appeal with costs.

Appeal dismissed.

Solicitor: *Skrine & Co.*

TANG CHOK CHING v. WONG IK TIENG & ORS.

[F.C. (Ismail Khan C.J. (Borneo), Gill F.J. and Pawan Ahmad J.) April 11, 1973]

[Kuching — Federal Court Civil Appeal No. 42 of 1972]

Practice and Procedure — Judgment in default of appearance — Application to set aside judgment — Proof of irregularity or prima facie defence on merits — Action by firm against one of its partners — Execution of judgment — Leave of court necessary — R.S.C., 1957, O. 13 r. 10 and O. 48A r. 10.

In this case the respondents suing as a firm had claimed payment of a debt due by the appellant to the firm. It appeared that the appellant was one of the partners of the firm. The appellant having failed to enter appearance, judgment in default was entered against him. The appellant subsequently applied to have the judgment set aside and a prohibitory order issued pursuant to that judgment rescinded. The application was dismissed in the High Court and the appellant appealed.

Held: (1) as the appellant had not shown that the judgment obtained was irregular or that he had a *prima facie* defence on the merits, his application to set aside the judgment was rightly dismissed;

(2) although a firm could bring an action against one or more of its members, where judgment was obtained by the firm against one or more of its partners, no execution could be issued without leave of the court or a judge;

(3) as there was no evidence in this case that the prohibitory order was issued with the leave of the court, it could not stand and the application to set aside the prohibitory order and all subsequent proceedings must therefore be allowed.

Case referred to:-

(1) *Chinese Rehabilitation Loans Board* v. *Chee Hoi Woon* [1959] M.L.J. 152.

FEDERAL COURT.

Joseph Tang for the appellant.

Leong Ee Ong for the respondents.

Gill F.J.: This is an appeal from an order of the High Court at Kuching dismissing the application by the appellant, as defendant in the action, that the judgment entered against him in default of appearance be set aside and he be granted leave to defend the action, that the prohibitory order issued pursuant to that judgment be rescinded and that the summons for directions issued in the course of such execution proceedings be stayed.

The action was commenced by the respondents, suing under the firm name of Lian Seng Timber Contractor Company, by a specially endorsed writ issued on June 5, 1971. The plaintiffs' claim was for the sum of $39,225.26 being a debt which the plaintiffs' books showed the defendant to be justly owing to the plaintiffs. A statement of account in Mandarin and a translation thereof in English were exhibited to the statement of claim which was specially endorsed on the writ. The defendant having failed to enter an appearance after the writ was duly served on him, judgment for the amount claimed was entered against him on July 7, 1971.

The application to set aside the judgment was made by summons-in-chambers on August 30, 1971. In his affidavit in support of the application, the defendant stated that on receipt of the writ he promptly wrote to the Registrar of the High Court at Kuching a letter dated June 25, 1971 and headed Statement Of Defence denying the plaintiffs' claim of $39,225.26. He further stated that the Registrar advised him to file the defence after he had entered an appearance and to deliver a copy of it to the solicitors for the plaintiffs, but that due to his belief that he had already delivered his defence as contained in his letter of June 25, 1971 and owing to his complete ignorance of the law and procedure he omitted to enter an appearance or to file a defence. In his supplementary affidavit sworn to on November 30, 1971 he stated that he together with the members of his family and friends had half of the total shares in Lian Seng Timber Contractor Company and in a company known as Batang Ai Logging Sendirian Berhad, that Batang Ai Logging Sendirian Berhad and Lian Seng Timber Contractor Company shared the same manager and treasurer, and that since the accounts of both companies had never been properly audited from the time the plaintiffs took over the management in March, 1970, the account on which he was sued was grossly inaccurate and indeed wrong.

In dealing with the defendant's application the learned judge took the view that the gist of the affidavits in support of the application was a mere denial of the debt which, under the rules relating to pleadings, was insufficient, and that there was no substance in the other matters raised by the defendant. In the event he dismissed the application with costs.

It is clear that the application to set aside the judgment in default was made under Order 13 rule 10 of the Rules of the Supreme Court, 1957, which says that "it shall be lawful for a court or a judge to set aside or vary such judgment upon such terms as may be just".

One of the grounds of appeal is that the learned judge was wrong in holding that the judgment sought to be set aside was a regular judgment and that a mere denial of the debt was insufficient. A short answer to this ground is that if it is desired to set the judgment aside for irregularity, the irregularity must be specified in the summons. No mention having been made of any such irregularity and the judgment having been obtained for default of appearance, there can be no doubt that it was a regular judgment. It is true that the court has an absolute discretion to set aside even a regular judgment, but the court's discretion must be exercised in accordance with the settled principle that if the judgment is a regular judgment, then it is an almost inflexible rule that there must be an affidavit of merits stating facts showing a substantial ground of defence. (See *The Chinese Rehabilitation Loans Board* v. *Chee Hoi Woon*).[1] The defendant having failed to disclose a *prima facie* defence on the merits, his application to set aside the judgment was therefore rightly dismissed.

The second ground of appeal is that the debt being due to the firm, the action should have been brought in the name of the firm and not in the names of individual partners. This ground, to my mind, is also without any substance. It is clear from the title of the action that the individual partners were suing in the name of the firm, so that the action was essentially an action by the firm. It is true that there was no need for the individual partners to disclose their names in the title to the action, but such disclosure was a mere irregularity which, in my judgment, did not render the proceedings null and void.

It is next said that the learned judge failed to appreciate that as one of the joint plaintiffs was dead before the issue of the writ, the action was a nullity. This is a point which was never taken before the learned trial judge. Suffice it to say that there was not the slightest evidence on record that any one of the plaintiffs was dead before the issue of the writ, so that this point really calls for no consideration. But assuming that one of the plaintiffs was in fact dead, I do not think there was anything irregular in the surviving partners having brought the action, in which case it can be treated as an action by them against the defendant as one of the partners and not an action by the firm.

Arising out of the second ground of appeal is the further ground that the defendant being a member of the firm, no action could be maintained against him as shareholder. It is not clear what is meant by the defendant being a shareholder, but if it means that he was a shareholder in the other company, then that question is entirely irrelevant to these proceedings. If the contention is that as a partner of the plaintiff firm he could not be sued, then there is no validity in that contention by reason of Order 48A rule 10 which reads as follows: —

> "The above Rules shall apply to actions between a firm and one or more of its members, and to actions between firms having one or more members in common, provided such firm or firms carry on business within the jurisdiction, but no execution shall be issued in such actions without leave of the Court or a Judge, and on an application for leave to issue such execution all such accounts and inquiries may be directed to be taken and made, and directions given, as may be just."

It is clear from that rule that a firm can bring an action against one or more of its members. This ground therefore must also fail.

It is to be observed that the defendant, apart from applying to have the default judgment set aside, had also applied for the execution proceedings following the judgment to be rescinded. The blanket dismissal of the application by the learned judge was therefore tantamount to a dismissal of the application to set aside those execution proceedings as well. It is here that, in my judgment, the learned judge went wrong. The second limb of rule 10 of Order 48A makes it quite clear that where judgment has been obtained by a firm against one of its partners, no execution shall be issued without leave of the court or a judge. There being no evidence that the prohibitory order was issued with the leave of the court, it cannot stand. The application was in two parts. The learned judge was right in dismissing the first part of the application, but the second part of the application, for the reasons I have stated, should have been allowed.

In the circumstances, I would dismiss the appeal against the dismissal of the application to set aside the judgment but allow the appeal against the dismissal of the application as regards the prohibitory order and the subsequent proceedings. In the result, I would set aside the order made by the learned judge and substitute in its place an order that the defendant's application to set aside the judgment do stand dismissed but that his application to set aside the prohibitory order and all subsequent proceedings be allowed. In all the circumstances of the case, I would make no order as to costs.

Ismail Khan C.J. and **Pawan Ahmad J.** concurred.

Order accordingly.

Solicitors: *Tang & Co.; Ee, Lim, Tai & Leong.*